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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term - 1995

CHARLES HENRY CUNNINGHAM,

Petitioner,

vs.

WHITTIER UNION HIGH SCHOOL DISTRICT, A SCHOOL DISTRICT OF LOS ANGELES COUNTY; WHITTIER HIGH SCHOOL, A SUB-DIVISION OF WHITTIER UNION HIGH SCHOOL DISTRICT; PAUL MUSCHETTO; LEE PANAGOS; RON PERRY; AND DOES 1 THROUGH 10, INCLUSIVE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the California Courts denied Petitioner his Constitutional right to be free of bias in the work place in its determination that racial slur to White Petitioner by Black Supervisor, and attendant damages, was not

actionable as a matter of law, notwithstanding Jury Verdict?

2. Did the California Courts deny Petitioner his Constitutional rights to due process and equal protection of the law by its holding that retaliation for exercise of Union rights, retaliation for exercising Workers' Compensation rights, (and) or retaliation for reporting his Supervisor's racial slur and drinking on school premises, was not actionable, as a matter of law, notwithstanding Jury Verdict?

3. Did the California Courts Deny Petitioner his Constitutional rights to due process and equal protection of the law by arbitrarily refusing to enter Judgment on Jury's Special Verdict?

4. Whether or not Petitioner was denied his Constitutional rights to due process and equal protection of the law in denial of State's mandated right to trial

by Jury.

PARTIES

The parties hereto are listed in the caption of this Petition. Petitioner CHARLES HENRY CUNNINGHAM was the plaintiff in the trial Court, Appellant in the California Court of Appeal and Supreme Court. Jacque Boyle, was, and is, at all times involved, Petitioner's Attorney of record.

Respondent entities, WHITTIER UNION HIGH SCHOOL DISTRICT (School District), and WHITTIER HIGH SCHOOL (High School), defendants in the lower Court, were petitioner's employers, and the individual respondents, PAUL MUSCHETTO (Muschetto), LEE PANAGOS (Panagos), RON PERRY (Perry), were petitioner's supervisors and superiors during his employment term.

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REFERENCES TO OPINIONS, DECISIONS AND JUDGMENTS OF THE LOWER COURTS

The Jury's Verdict of September 23, 1992, awarding Petitioner Judgment against defendants in the total sum of $97,170.00, is attached hereto as Appendix "A", and the Judgment entered September 24, 1992, thereon, as arbitrarily modified by the lower Court to $77,170.00, is attached hereto as Appendix "B".

Appendix "C" are Jury Instructions 13 and 23, given by the Court, which are the subject of Petitioner's Argument hereinafter set forth.

The lower Court's Minute Order granting Respondents' Motion for Judgment Notwithstanding Jury Verdict is attached hereto as Appendix "D", and its Order For and Judgment By Court Pursuant to California Code of Civil Procedure, §629, is attached hereto as Appendix "E".

The Opinion of the California Court

of Appeal, Second Appellate District, Division 2, is attached hereto as Appendix "F", and forms the basis of this Petition for Writ of Certiorari. The California Supreme Court's Order Denying Review, dated May 24, 1995, is attached hereto as Appendix "G".

JURISDICTION

The Jury's Special Verdict was filed September 23, 1992, and the Judgment on Special Verdict was entered September 24, 1992 (Appendices "A" and "B").

The lower Court's Order For and Judgment By Court Pursuant to California Code of Civil Procedure §629 (Appendix "E") was filed December 16, 1992. The Opinion and Decision of the Court of Appeal, Second Appellate District, Division 2, was filed and entered March 3, 1995 (Appendix "F"). Petition for Rehearing was filed, and the same was denied on March 28, 1995.

Petitioner's Petition for Reveiw before the California Supreme Court was denied on May 24, 1995, without opinion (Appendix "G").

This Petition for Writ of Certiorari is filed within ninety days from said date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

> "Section 1. All persons born or naturalized in the Untied States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

STATEMENT OF THE CASE

Note: Petitioner, Charles Henry Cunningham, plaintiff in the lower Court, is hereinafter referred to as Plaintiff, and Respondents referred to as Defendants.

I. Nature of the Action:

This is a wrongful termination and breach of employment contract case. Plaintiff also brought his Causes of Action for Intentional Infliction of Emotional Distress, Interference with Prospective Economic Advantage, and Violation of Civil Rights, claiming "inverse" discrimination in the work place.

II. Summary of Material Facts

Plaintiff Charles Henry Cunningham, now 44 years of age, (RT Vol.

I, pg 1, lns 23-24) worked as a journeyman custodian in the Santa Ana School District, for some seven years, prior to 1989. (RT Vol. I, pg 7, lns 15-19). Plaintiff first learned of an opening at defendant Whittier Union High School District as a Lead-Man and applied, but was not hired. He later submitted an Application for an opening as a custodian, but again was not hired (RT Vol. I, pg 16, ln 23 to pg 19 In 7).

Thereafter, in November of 1989, he was offered employment by Lee Panagos, defendant Whittier Union High School District as a custodian at Whittier Union High School (RT Vol. I, pg 19, ln 19-21; pg 21, ln 3 to pg 22, lns 7-20). Plaintiff was further promised ready promotion and was encouraged to, and did, quit his employment with the Santa Ana Unified School District, to accept such employment with Respondent SCHOOL DIS-

TRICT, on December 10, 1989 (RT Vol. I, pg 196, ln 25, to pg 197, ln 3).

Plaintiff's first Evaluation Report, on January 22, 1990, was excellent (Plaintiffs Exhibit 2). However, Plaintiff became involved in a Union dispute and was spokesman for the night custodians, to obtain off premises dinner rights, which had been denied by the custodians' supervisor, respondent Panagos. (RT Vol II, pg 229, ln 20 to pg 231, ln 22). Plaintiff also reported that Ron Perry, his immediate supervisor, consumed alcoholic beverages on school premises while on the job. (RT Vol II, pg 323, ln 8 to pg 324, ln 14; pg 463, ln 24 to pg 464, ln 28).

As a result of the Union complaints, the custodians were granted off-premises dinner rights. Thereafter, all subsequent progress work reports made by defendant PANAGOS of Plaintiff's work performance were adverse (Exhibit 6, 7), and plaintiff

testified as to the fabricated character of such reports (RT , Vol I, pg 60, ln 8 to pg 61, ln 18).

Then, in March, 1990, defendant PERRY, publicly, at a meeting of the night custodians, accosted the plaintiff, and stated, in substance, "When I talk to a White man, I especially want him to look me in the eye" (RT, Vol I, pg 40, lns 19-22). Plaintiff reported this incident to defendant PANAGOS (Exhibit 3). Defendant PANAGOS requested an explanation of defendant PERRY, who responded by suggesting that plaintiff should be fired (Exhibit 4). During his employment with defendants, plaintiff suffered an industrial injury and exercised his Workers' Compensation right to obtain medical treatment and disability pay. When he returned to work, defendants gave plaintiff excessive work loads, unconscionable duties, and an oppressive night work schedule, rendering

satisfactory performance impossible, and giving rise to complaints against plaintiff. Plaintiff's employment was terminated on August 10, 1990 (App. Vol I, pg 5, ln 27, to pg 6, ln 2), and plaintiff was given poor references in his subsequent attempts to obtain employment (RT Vol I, pg 53, ln 7 to pg 55, ln 28).

Other pertinent facts appear in the remaining portions of this Petition.

III. Proceedings to Date

Plaintiff filed his lawsuit on May 9, 1991 (App. Vol. I, pgs 1-29), and the case became at issue on June 3, 1991, when defendants filed their Answer (App. Vol I, pgs 30-40). Thereafter, the plaintiff's case came to trial by jury on September 3., 1993 (App Vol I, pg 87).

At the conclusion of the plaintiff's case, the Court granted defendants' Motion for Non-suit as to plaintiff's Third Cause of Action for Intentional Interference

with Prospective Economic Advantage, and struck plaintiff's claim for punitive damages (RT, Vol. II, pg 347-374, ln 8; RT Vol III, pg 475-482, ln 7; App, Vol. I, pgs 90-104; Vol I, pgs 107-112). The jury rendered its verdict on September 24, 1993, denying plaintiff's cause of action for Wrongful Termination (Special Verdict Questions 1 through 6), denying plaintiff's Cause of Action for Violation of Civil Rights, (Special Verdict Questions 7-12), found for the plaintiff on his Intentional Infliction of Emotional Distress Cause of Action, awarded plaintiff the sum of $20,000.00, and further found for the plaintiff on the Breach of Contract - Breach of the implied covenants of good faith and fair dealings, awarding damages in the sum of $77,170.00 on that cause of action (App. Vol. I, pgs 183-186).

The trial court ruled that the $20,000.00 award was invalid and entered

judgment for the plaintiff in the sum of $77,170.00 (RT, Augmentation, pg 20, lns 6 to pg 44; App Vol I, pgs 183-186).

Defendants brought their Motions for New Trial and for Judgment Notwithstanding the Jury Verdict (App, Vol II, pgs 187-234).

Plaintiff brought his Motions for New Trial as to the First and Second Causes of Action, only, and to reinstate the $20,000.00 in the Judgment. (App Vol II, pgs 235-241; 282-296)

The Trial Court granted defendants' Motion for Judgment Notwithstanding the Verdict, and entered Order for and Judgment Per C.C.P. §629, on December 16, 1992, in favor of the defendants and against plaintiff, that plaintiff take nothing, and denied plaintiff's Motions for New Trial as to the First and Second Causes of Action, and to restore the $20,000.00 jury verdict on the Intentional

Infliction of Emotional Distress Cause of Action (App., Vol II, pgs 354-355 and 356-357).

Plaintiff filed his appeal, and on March 3, 1995, the Court of Appeal, Second Appellate District, Division Two, affirmed the lower Court's orders, rulings and Judgment. Plaintiff's Petition for Re-hearing was denied by the Court of Appeal on March 28, 1995.

The California Supreme Court denied Petitioner's Petition for Review on May 24, 1995.

IV. Federal Questions Raised in the California Appellate and Supreme Court.

In plaintiff's Appellant's Opening Brief, plaintiff argued that the "Court's rulings, Judgment and Orders were reversible error, and constituted a denial of plaintiff's Constitutional rights to due process and trial by jury" (Appellant's Opening Brief, pg 7).

In plaintiff's Petition for Review to the California Supreme Court, plaintiff argued that he was deprived of his Constitutional rights to due process and the equal protection of law, by the Court's Judgment that plaintiff take nothing by his Complaint (Petition for Review, pgs 10-17).

While not designated as Federal Questions, as such, much of the Argument here submitted was submitted to the California Court of Appeal and was a part of plaintiff's Petition for review before the California Supreme Court.

REASONS FOR ALLOWANCE OF WRIT

I. CALIFORNIA COURTS DENIED PETITIONER HIS CONSTITUTIONAL RIGHT TO BE FREE OF BIAS IN THE WORK PLACE IN ITS DETERMINATION THAT RACIAL SLUR TO WHITE PETITIONER BY BLACK SUPERVISOR, AND ATTENDANT DAMAGES, WAS NOT ACTIONABLE AS A MATTER OF LAW, NOTWITHSTANDING JURY VERDICT.

"(a) It shall be an unlawful employment practice for an employer-- (1) ...to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color..."

42 U.S.C.§2000e-2

"This subchapter protects white persons as well as black persons from certain forms of racial discrimination in employment."

Freeze v. ARO, Inc.

D.C.Tenn.1980,

503 F.Supp. 1045

"Standards of impermissible job discrimination are same under 42 U.S.C.A. § 2000e seq. and under this [14th] amendment."

Clark v. Chesterfield

County County School Dist.

etc. et al., C.A.S.C.

(1973), 484 F.2D 70

The California Court's denial of the foregoing Federal mandated prohibition against bias in the workplace, denied petitioner his Constitutional rights to due process and equal protection of the laws as guaranteed by the U.S. Constitution, Fourteenth Amendment.

California recognizes the tort of Intentional Infliction of Emotional Distress, and permits an action at law for acts committed in the workplace, that "contravenes fundamental public policy or exceeds risks inherent in employment relationship..." (Underlining added)

Livitsanos v. Superior Court

2 Cal.4th 744 @ 754; 7 C.R. 2d 808

The Special Verdict, as rendered by the Jury, awarded the Plaintiff $20,000.00 in its response to Special Verdict Question Nos. 13-16, finding for the plaintiff

on his Cause of Action for Intentional Infliction of Emotional Distress. The Trial Court concluded that such cause of action was dependent upon conduct in violation of public policy, and in view of the jury's finding by its answer to Question No. 1, that plaintiff's employment was not terminated in violation of public policy, and Question No. 7 to the effect that defendants did not discriminate against plaintiff on the basis of race, the cause of action for Intentional Infliction of Emotional Distress could not lie under any circumstances.

The jury was not fairly instructed in the foregoing regard, as they were given a misleading instruction of overall employer policy (Appendix "C"), rather than prohibitions racial discrimination in the workplace, in general.

However, the conduct of each of the individual defendants constituted conduct

in violation of public policy, and reasonably calculated to cause plaintiff to suffer extreme emotional distress, apart from the racial slurs that were the subject of the jury's denial of recover in its preceding responses to Special Verdict Questions 6 through 12. And while the jury's response to Question 1 affirmed that the defendant SCHOOL DISTRICT did not terminate plaintiff's employment as a violation of public policy, (because, as we will argue, of the Court's limiting instruction), it did not hold that the individual defendants did not act in violation of public policy in causing plaintiff to suffer severe emotional distress in the work place.

In that connection, the jury could have, and undoubtedly did, hold that defendant PANAGOS' conduct in fabricating false, negative, work reports, and defendant PERRY's conduct in publicly humiliat-

ing plaintiff, and defendant MUSCHETTO's conduct in failing to require an appropriate apology from defendant PERRY for his racial slur, as well as conduct of defendants in preventing plaintiff from completing his duties by deliberately keeping supplies and equipment from him, and assigning plaintiff an excessive work load, and causing plaintiff to lose his job, all caused plaintiff to suffer extreme emotional distress, and were done in retaliation for plaintiff's exercise of his Union rights, his "whistle blowing" as to defendant PERRY's drinking on the School premises, and reporting defendant PERRY's racial slurs, and plaintiff's exercise of his workers' compensation rights after being injured on the job, all in violation of pervasive public policy.

Further, while the jury may have held that the racial slur did not rise to the level of racial discrimination, it was

a racially motivated act calculated to cause extreme emotional distress, and would necessarily contravene public policy.

Finally, defendant PANAGOS' acts and conduct prior to plaintiff's employment by defendant SCHOOL DISTRICT, in inducing plaintiff to give up his permanent employment with the Santa Ana School District to work for defendant SCHOOL DISTRICT, on the promise of permanent employment (RT pg 16, lns 2-16; pg 26, lns 4-7), when in fact only temporary employment was provided to plaintiff, and when, in fact, defendant PANAGOS had no intention of fulfilling such promises and affording plaintiff permanent employment, would not come within the "public policy" limitations of the cause of action for Intentional Infliction of Emotional Distress in the work place.

In the recent case of Fermino v. Fedco, Inc. (1994) 7 Cal.4th 701; 30 C.R.

2d 18, the California Supreme Court stated that the limitations on recovery of Emotional Distress damages occurring in the work place did not apply to causal acts and to conduct of the employer that are not a "normal aspect of the employment relationship":

> "What matters, then, is not the label that might be affixed to the employer conduct, but whether the conduct itself, concretely, is of the kind that is within the compensation bargain."
>
> Fermino v.Fedco,
>
> supra @ 6429

Denial of plaintiff's cause of action for the employer's discriminatory conduct in the workplace, the racial slur, denied plaintiff the equal protection of the law. Others similarly situated would be afforded that cause of action.

Whether or not defendant PANAGOS

unconscionably, and fraudulently, induced plaintiff to leave his permanent employment with the Santa Ana School District, was a question of fact for the jury to determine, and the damages that flowed to plaintiff upon the later termination of his employment with defendant WHITTIER HIGH SCHOOL DISTRICT, was well documented, and again, an issue for the jury's determination.

II. CALIFORNIA COURTS DENY PETITIONER HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY ITS HOLDING THAT RETALIATION FOR EXERCISE OF UNION RIGHTS, RETALIATION FOR EXERCISING HIS WORKERS' COMPENSATION RIGHTS, (AND) OR RETALIATION FOR REPORTING RACIAL SLUR, WAS NOT ACTIONABLE, AS A MATTER OF LAW, NOTWITHSTANDING JURY VERDICT.

California law recognizes a covenant of good faith and fair dealings in every contract, and application of that covenant

to contracts of employment, where contract damages are sought (Foley v. Interactive Data Corp. (1988) 47 Cal.3d 692 @ 700; 254 C.R. 211. In Foley, the California Supreme Court affirmed that, as to the breach of the covenant of good faith and fair dealings, the contract remedies for such breaches are available in an employment contract to employees who allege they have been discharged in violation of the covenant.

In the instant case, plaintiff's evidence before the Trial Court confirms that the covenants of good faith and fair dealings would necessarily include freedom from harassment by publically stated racial slurs, neither repudiated nor the subject of a public or private apology by the employer, freedom to exercise one's Union rights, freedom to exercise one's workers' compensation rights, when injured on the job, and freedom from retaliation

from the exercise of such rights, as well as freedom from harassment by superiors. Such covenants were breached and the employment terminated because of such egregious conduct by defendants. The contract cause of action for breach of the covenants of good faith and fair dealings, necessarily includes the termination of employment because of such breach, as even the California Book of Approved Jury Instructions provides for such economic damages (only). (B.A.J.I 10.54 (1992 Revision). Such damages necessitate and contemplate the loss of employment, therefore earnings.

The trial Court's vacating of the Jury Verdict awarding $77,170.00 to plaintiff, and its Judgment entered in favor of defendants, is error and a denial of plaintiff's right to due process and equal protection of law, guaranteed by the Fourteenth Amendment.

The trial Court held, in its ruling, that the jury found against plaintiff on the issue of whether defendants' conduct violated public policy. That holding is in error. The jury held, instead, that defendants did not terminate plaintiff's employment for reasons in violation of public policy, by its response to Special Verdict Question No. 1. And the Jury's finding in response to Special Verdict Question No. 7 (Appendix "A"), that defendants did not cause plaintiff emotional distress because of racial discrimination, did not exclude emotional distress because of a public issued racial slur, or because of other public policy reasons, such as retaliation for exercising Union rights or workers' compensation rights.

Here, the plaintiff contends, and the jury undoubtedly found, that the defendants' breached the covenants of good faith and fair dealings, including the

implied covenant that plaintiff would have a stable place in which to work, with equipment furnished for him so that he could complete his duties; that plaintiff did not have to endure racial slurs from his superiors; that plaintiff would not have to suffer retaliation from his exercise of his Union rights; that plaintiff would not have to suffer retaliation for exercising his right to Workers' Compensation benefits when injured on the job; that plaintiff would not be subjected to deliberately false "Performance Reports"; and that plaintiff would be free from continual harassment on the job.

All of the foregoing must surely be not within the compensation bargain. It is one thing to say that an employee, specifically at will, cannot contend that the contract of employment must be interpreted to become a contract of permanent employment, but quite another to say that the

covenants of good faith and fair dealings does not require the employer to desist from the foregoing conduct.

A review of the record, as the California Supreme Court has mandated where the Lower Court's Judgment Notwithstanding the Jury's Verdict is on appeal (Henrioulle v. Martin Ventures (1978) 20 Cal.3d 512 @ 515), must have unquestionably convinced the Appellate Court that defendants' conduct at issue here, not only exceeded the risks inherent in the usual employment relationship, but was against public policy, including that set forth by Labor Code §923, declaring the public policy of California to include the protection of union workers, in "...activities for the purpose of collective bargaining or other mutual aid or protection". (See also, Glenn v. Clearman's Golden Cock Inn (1961) 192 C.A.2d 793; 13 C.R. 769).

Failure of the California Courts' to apply its own substantive and procedural rules of law, as above noted, including Labor Code, §923, clearly denied plaintiff the due process and equal protection of the law mandated by the U.S. Constitution, Fourteenth Amendment.

III. CALIFORNIA COURTS DENY PETITIONER HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY ARBITRARILY REFUSING TO ENTER JUDGMENT ON JURY'S SPECIAL VERDICT.

The Trial Court entered its Judgment on the Special Verdict in the sum of $77,170.00, $20,000.00 less than the Jury's award. (App Vol I, pgs 183-186). Plaintiff contends that the trial Court did not act within its jurisdiction, and made and entered its Judgment for $20,000.00 less than the Jury's award, without authority or precedent, and in error.

In the first instance, the Court could not, on its own motion, eliminate $20,000.00 of the Jury's Verdict, under the authority of California Code of Civil Procedure §629, authorizing a Judgment Notwithstanding Verdict, as that Code Section requires five days notice, which was not given.

The Special Verdict, as rendered by the Jury, awarded the Plaintiff $20,000.00 in its response to Question Nos. 13-16, finding for the plaintiff on his Cause of Action for Intentional Infliction of Emotional Distress. On the day of the verdict, the Trial Court concluded that such cause of action was dependent solely upon conduct in violation of public policy, and such violation of public policy could not be found from the evidence. Nothing could be further from the truth, as has been herein argued.

The trial Court also made its addi-

tional finding that "...the jury did not find there was any discrimination against Mr. Cunningham at any time during his employment..." (RT, September 15, 16, 22, 23 and 24, 1992, pg 30, lns 20-22), and on that basis, eliminated the jury's $20,000.00 award to plaintiff for Intentional Infliction of Emotional Distress. Notwithstanding the Court's statement to the contrary, the jury did not find that the plaintiff was not subject to discrimination in the workplace. Nor did the jury find that the defendants' conduct that caused plaintiff to suffer extreme emotional distress, was not in violation of public policy, nor that such conduct did not "...exceed the risks inherent in the employment relationship."

The Appellate Court, in Knapp v. Newport Beach (1960) 186 C.A.2d 669, 682; 9 C.R. 90, addressed the lower Court's authority to alter the Judgment by "sup-

plementing" the "findings", and held that "The procedure followed is not authorized, and such purported findings are of no force or effect". The same could be said for a trial Judge's "findings" adverse to the Jury Verdict.

However, much of the conduct of each of the individual defendants involved in this cause of action, constituted conduct reasonably calculated to cause plaintiff to suffer extreme emotional distress, and while the jury's response to Question 1 affirmed that the defendant SCHOOL DISTRICT did not terminate plaintiff's employment as a violation of public policy, because, we submit, of the Court's erroneous instructions (App. Vol. I, pg 138-145), it did not hold that the individual defendants did not act in violation of public policy in causing plaintiff to suffer severe emotional distress in the work place.

IV. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW AND AS GUARANTEED BY THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, IN DENIAL OF STATE MANDATED RIGHT TO TRIAL BY JURY.

> "The right to trial by jury is a basic and fundamental part of our system of jurisprudence. (Cal. Const., art. I, Section 16...) As such, it should be zealously guarded by the Courts (see Jacob v. City of New York (1942) 315 U.S. 752, 753, 62 S.Ct. 854, 86 L.Ed. 1166, 1168). ...The illegal denial of a jury where jury trial has not been waive would constitute cause to reverse any judgment."
>
> Byram v. Superior Court (1977) 74 C.A.3d 648; 141 C.R. 604

The Trial Court, in striking the

$20,000.00 award of the Jury to Plaintiff on his Intentional Infliction of Emotional Distress Cause of Action, and in granting Judgment for the defendants (thus eliminating the remaining $77,170.00 Verdict on the Breach of Contract - Good faith and Fair Dealings Covenants cause of action), necessarily determined factual issues of the case within the providence of the Jury. Conceding that the cause of action for Intentional Infliction of Emotional Distress may only occur for conduct in the workplace that is in contravention of fundamental public policy, or not contemplated or inherent in the usual employment relationship (Livitsanos v. Superior Court, supra), such determination is a question of fact for the jury. Thus, the Trial Court held, in substance, that none of the egregious conduct of the defendants involved in this case could have been found by the jury to be in contravention

of fundamental public policy, or outside the anticipated employer/employee relation. The Trial Court cannot, permissively, hold that such conclusions were not within the realm of the Jury's reasonable conclusion from the evidence of this case.

In that connection, plaintiff submits that the Court of Appeal did not review the record in its entirety, in upholding the trial Court's decision in that regard. All of the Appellate Court's erroneous findings, and errors of law were noted in Appellant's Petition for Rehearing, denied as aforesaid.

Finally, the Trial Court believed that the BAJI Instruction on the Intentional Infliction of Emotional Distress, submitted by Plaintiff, were in error. The BAJI Instructions were appropriate, as far as they went (App. Vol I, pg 152-156). The Trial Court should have instructed to the jury on every issue of the case (Thom-

as v. Buttress & McClellan (1956) 141 Cal.App.2d 812, 819; 297 P.2d 768), including the limitations on an Intentional Infliction of Emotional Distress cause of action on matters occurring in the workplace, i.e., limited to conduct in violation of fundamental public policy or not within the anticipated, normal, employment relationship.

The failure of the California Courts to enter Judgment on the Jury Verdict of $97,170.00, in favor of plaintiff and against defendants, was an arbitrary denial of due process and equal protection of the law, as guaranteed by the Fourteenth Amendment.

IV. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY DENIAL OF CALIFORNIA'S MANDATED RIGHT TO TRIAL BY JURY IN CIVIL ACTIONS.

At the conclusion of plaintiff's

case, defendants made their Motions for Non-suit as to all causes of action, and to strike the plaintiff's allegations for punitive damages. After the case was argued, the Trial Court granted defendants' Motion as to the Third Cause of Action, Intentional Interference with Prospective Economic Advantage, only, and struck punitive damages (RT Vol II, pgs 347-374, ln 8; RT Vol III, pg 475-482, ln 7; App. Vol I, pgs 90-104; Vol. I, pgs 107-112). Such ruling were error, as hereinafter argued.

The trial Court did not consider the several contracts involved that plaintiff contends were the subject of his Third Cause of Action.

The first issue of the Interference with Prospective Economic Advantage Cause of Action, was plaintiff's contract of employment with the Santa Ana School District, plaintiff's employer for some seven years prior to the events of this lawsuit.

While employed by the Santa Ana School District, plaintiff first applied for a higher position (leadman) with defendant WHITTIER UNION HIGH SCHOOL DISTRICT. Plaintiff was not hired for that particular position.

Thereafter, various methods were then used to induce the plaintiff to terminate his employment contract and to leave his employment with the Santa Ana School District, and were outlined for the jury, including defendant PANAGOS' false representations that the employment offered to plaintiff with defendant SCHOOL DISTRICT would be, in effect, a permanent position, not subject to the uncertainties as evolved in this case, and that the probationary period would be a mere formality (RT pg 15, ln 2, to pg 16, ln 16). Whether or not defendant PANAGOS unconscionably, and fraudulently, induced plaintiff to leave his permanent employment with the

Santa Ana School District, was a question of fact for the jury to determine, and damages, that flowed to plaintiff upon the later termination of his employment with defendant WHITTIER HIGH SCHOOL DISTRICT, was well documented, and again, an issue for the jury's determination.

The second issue of plaintiff's contentions of Intentional Interference with Prospective Economic Advantage, concerns the conduct of defendants MUSCHETTO and PERRY, in deliberately withholding supplies from plaintiff CUNNINGHAM, thereby hindering plaintiff from performing his duties, and in causing the preparation of false, adverse "Performance Reports" as to plaintiff's completion of his duties (Exhibits 6 and 7). The circumstantial evidence was compelling that all of the foregoing was done in retaliation for plaintiff's exercise of his Union rights (RT Vol. I, pg 30, ln 17 to pg 34, ln 9),

or because he was injured on the job and exercised his workers' compensation rights, or because he reported a superior drinking on the school premises, and racial slurs by his supervisor (RT Vol I, pg 23, ln 17 to pg 25, ln 8).

When the trial Court arbitrarily disregarded the jury verdict of $20,000.00 on the Intentional Infliction of Emotional Distress Cause of Action, and thereafter granted defendants' Motion for Judgment Notwithstanding the Verdict, the trial Judge substituted his findings and conclusions on the issues of the case in place of the Jury's findings and conclusions, and took from the plaintiff the Jury's verdict in favor of plaintiff and against defendants for $97,170.00, awarding the plaintiff, instead, nothing.

The Trial Judge thus denied plaintiff his right to a trial by jury, as mandated by California law.

"Trial by jury is an inviolate right and shall be secured to all..." (California Constitution, Art. I, §16). It '...is a basic and fundamental part of our system of jurisprudence.' (Byram v. Superior Court 74 Cal.App.3d 648, 654, 141 C.R. 604.) A right so fundamental and sacred to the citizen whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the Courts.' (Jacob v. New York (1942) 315 U.S. 752...).

People v. Hibbard (1991)
231 C.A.3d 100; 282 C.R. 351

Due process and equal protection of the law requires the application of law to all persons, equally, at least in the absence of some exceptional circumstances based upon an interest possessed by the State in the class of persons (or in the person), constituting, or within, the exception. (See Sawyer v. Sigler D.C.Neb.

(1970) 320 F.Supp. 690 (Affirmed 445 F.2d 818).

CONCLUSION

Petitioner was denied his right to a fair and impartial trial, his right to a trial by Jury, and his rights to redress for racial discrimination, intentional infliction of emotional distress, and breach of the covenants of good faith and fair dealings of his employment contract.

He was wrongfully terminated from his employment, and left, by the California Courts, without remedy or redress, notwithstanding a jury's verdict awarding him $97,170.00.

Petitioner prays that this Court grant Certiorari, review this case, and render its decision herein, reinstating to plaintiff his jury verdict award and Judgment therein, or in the alternative, remand the case to the State Courts, with this Court's decision protecting

petitioner's rights, and affording petitioner due process and equal protection of law.

DATED: August 22, 1995

Jacque Boyle

JACQUE BOYLE
Attorney for Petitioner

APPENDIX "A"

Jury's Special Verdict

APPENDIX "A"

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CHARLES HENRY CUNNINGHAM, Plaintiff, -vs- WHITTIER UNION HIGH SCHOOL DISTRICT, etc. et al., Defendants,	No. VC 005195 SPECIAL VERDICT

We, the Jury, in the above entitled case, find the following special verdict on the questions submitted to us:

QUESTION NO. 1:

Did Defendant Whittier Union High School District terminate plaintiff's employment, without cause, for reasons in violation of public policy?

ANSWER "Yes" or "No"

ANSWER: ___NO_____

If "yes", go on to the next question. If "No", go to question 6.

QUESTION NO. 2:

Did such termination of plaintiff's employment, cause plaintiff to suffer emotional distress?

ANSWER "Yes" or "No"

ANSWER: _____

If "yes", go on to the next question. If "no", go to question 4.

QUESTION NO. 3:

What is the amount you assess against defendant WHITTIER UNION HIGH SCHOOL DISTRICT to compensate plaintiff for the emotional distress that you have determined was caused by such termination of his employment?

ANSWER: $_____

QUESTION NO. 4:

Did the termination of his employment cause plaintiff to suffer loss of earnings, past and prospective?

ANSWER "Yes" or "No"

ANSWER: _____

If "yes", go on to the next question. If "No", go to question 6.

QUESTION NO. 5:

What is the amount you assess against defendant WHITTIER UNION HIGH SCHOOL DISTRICT for plaintiff's loss of earnings, past and prospective, that you determined was caused by such termination of his employment?

ANSWER: $_____

QUESTION NO. 6:

Did defendants RON PERRY, LEE PANAGOS and PAUL MUSCHETTO, or any of them, discriminate against plaintiff on the basis of plaintiff's race, at any time during plaintiff's employment by defendant Whittier Union High School District?

ANSWER "Yes" or "No" as to each defendant:

RON PERRY: ____NO_____

LEE PANAGOS: ____NO_____

PAUL MUSCHETTO: ____NO_____

If "yes", as to any of the defendants, go on to the next question. If "No", as to all of the defendants, go to question 13.

QUESTION NO. 7:

Did defendants RON PERRY, LEE PANAGOS or PAUL MUSCHETTO, or any of them, cause plaintiff to suffer emotional distress because of racial discrimination?

ANSWER "Yes" or "No", as to each defendant:

RON PERRY: _____

LEE PANAGOS: _____

PAUL MUSCHETTO: _____

If "yes", as to any defendant, go on to the next question. If "No", as to all defendants, go to question 10.

QUESTION NO. 8:

What is the amount of damages you assess against defendants to compensate plaintiff for his emotional distress that

you have determined was caused by them.

ANSWER: $_____

QUESTION NO. 9:

What percentage of such damages do you attributed to each of the following defendants:

RON PERRY: _____%

LEE PANAGOS: _____%

PAUL MUSCHETTO: _____%

QUESTION NO. 10:

Did defendants' racial discrimination cause plaintiff to suffer loss of earnings, past and prospective? ANSWER "Yes" or "No"

ANSWER: _____

If "yes", go on to the next question. If "No", go to question 13.

QUESTION NO. 11:

What is the amount of damages you assess against defendants for plaintiff's loss of earnings, past and prospective that you have determined was caused by

such racial discrimination?

ANSWER: $_____

QUESTION 12:

What percentage of such damages do you attributed to each of the following defendants:

RON PERRY: _____%

LEE PANAGOS: _____%

PAUL MUSCHETTO: _____%

QUESTION NO. 13:

Did any of the defendants intentionally commit any outrageous acts or conduct against plaintiff?

Answer "Yes" or "No" as to each defendant:

RON PERRY: ____YES_____

LEE PANAGOS: ____YES_____

PAUL MUSCHETTO: ____YES_____

If "yes", as to any of the defendants, go on to the next question. If "No", as to all of the defendants, go to question 17.

QUESTION NO. 14:

Did such outrageous acts or conduct of any defendant cause plaintiff to suffer severe emotional distress?

ANSWER "Yes" or "No" as to each defendant:

RON PERRY: ____YES_____

LEE PANAGOS: ____YES_____

PAUL MUSCHETTO: ____YES_____

If "yes", as to any defendant, go on to the next question. If "No", as to all defendants, go to question 17.

QUESTION NO. 15:

What is the amount of damages you assess against defendants to compensate plaintiff for his severe emotional distress that you have determined was caused by such outrageous acts or conduct?

ANSWER: $ 20,000.00_____

QUESTION 16:

What percentage of such damages do you attribute to each of the following

defendants:

RON PERRY: 40 %

LEE PANAGOS: 43 %

PAUL MUSCHETTO: 17 %

QUESTION NO. 17:

Was plaintiff's contract of employment with Whittier Union High School District such that he could not be terminated except for good cause?

ANSWER "Yes" or "No"

ANSWER: NO

If "yes", go on to the next question. If "No", go to question 20.

QUESTION NO. 18:

Did defendant WHITTIER UNION HIGH SCHOOL DISTRICT breach said contract by terminating plaintiff's contract of employment, without good cause?

ANSWER "Yes" or "No"

ANSWER: _____

If "yes", go on to the next ques-

tion. If "No", go to question 20.

QUESTION NO. 19:

What is the amount of damages you assess against defendant WHITTIER UNION HIGH SCHOOL DISTRICT for plaintiff's loss of earnings, past and prospective, that you have determined was caused by such breach of contract?

ANSWER: $_____

QUESTION NO. 20:

Did defendant WHITTIER UNION HIGH SCHOOL DISTRICT breach the implied covenant of good faith and fair dealing of plaintiff's employment contract?

ANSWER "Yes" or "No"

ANSWER: ___Yes_____

If "yes", go on to the next question. If "No", sign and date this verdict.

QUESTION NO. 21:

Did defendant WHITTIER UNION HIGH SCHOOL DISTRICT's breach of said implied

covenant of good faith and fair dealings cause plaintiff to suffer loss of earnings, past and prospective?

ANSWER "Yes" or "No"

ANSWER: Yes

If "yes", go on to the next question. If "No", sign and date this verdict.

QUESTION NO. 22:

What is the amount of damages you assess against said defendant WHITTIER UNION HIGH SCHOOL DISTRICT for plaintiff's loss of earnings, past and prospective, that you have determined were caused by such breach of the implied covenant of good faith and fair dealings?

ANSWER: $ 77,170.00

Sign and date this verdict.

DATED: 09-24-92

DAVID H. CAMPOS
FOREPERSON

APPENDIX "B"

Judgment on Special Verdict

APPENDIX "B"

FILED
Los Angeles Superior Court
SEP 24 1992

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

CHARLES HENRY CUNNINGHAM VC 005195

Plaintiff(s)

vs

WHITTIER UNION HIGH SCHOOL DISTRICT, ETC. ET AL. Defendant(s)

JUDGMENT ON SPECIAL VERDICT

This action came on regularly for trial on September 3, 1992, in Department SE "L" of the Superior Court, the Honorable CHRIS R. CONWAY Judge Presiding; the plaintiff(s) appearing by attorney(s) JACQUE BOYLE and the defendant(s) appearing by attorney(s) RIC C. OTTAIANO of LYNBERG & WATKINS

A jury of 12 persons was regularly inpaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the

jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures Is follows, to wit:

(OVER)

(Here quote entire Special Verdict verbatim)

...

[FOR PURPOSES OF BREVITY, THE SPECIAL VERDICT, APPENDIX "A", IS NOT HERE REPEATED]

It appearing by reason of said special verdict /\ and the court's ruling this date, that:

plaintiff, CHARLES HENRY CUNNINGHAM, is entitled to Judgment against defendant, WHITTIER UNION HIGH SCHOOL DISTRICT,

Now therefore, it is ordered, ad-

judged and decreed that said plaintiff, CHARLES HENRY CUNNINGHAM have and recover from said defendant, WHITTIER UNION HIGH SCHOOL DISTRICT, judgment iin the amount of $77,170.00 (SEVENTY-SEVEN THOUSAND ONE HUNDRED SEVENTY DOLLARS) with interest thereon at the rate of ten per cent per annum from the date of the verdict until paid together with costs and disbursements amounting to the sum of $_____.

Dated September 24, 1992

s/ Chris R. Conway
JUDGE OF THE SUPERIOR COURT
Chris R. Conway

APPENDIX "C"

Jury Instruction 13

Jury Instruction 23

APPENDIX "C"

Instruction
No. 13

As to plaintiff 's Cause of Action for Violation of Civil Rights, the plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish:

1) that defendants' conduct constituted discrimination against plaintiff in the work place on the basis of bias or prejudice;

OR

2) discrimination against the plaintiff in the termination of plaintiff's employment on the basis of racial bias or prejudice;

3) Plaintiff's Damages caused by such conduct;

Instruction
No. 23

Plaintiff bears the burden of establishing the following elements to prove his claim of reverse discrimination when he was discharged from defendant's employ.

1. That background circumstances support the suspicion that defendant is the unusual employer who discriminates against the majority;

2. That the employer treated differently employees who were similarly situated but not members of the protected group.

APPENDIX "D"

Minute Order Granting Motion For Judgment Notwithstanding Verdict

APPENDIX "D"

DEPT. SEL

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

November 12, 1992
Honorable CHRIS R. CONWAY JUDGE

E. J. TALMACHOFF Deputy Clerk
P. Winer Deputy Sheriff
None Reporter

Charles Henry Cunningham

vs

WHITTIER UNION HIGH SCHOOL DISTRICT

NATURE OF PROCEEDINGS:
COURT'S RULING ON MOTIONS OF DEFENDANT FOR JUDGMENT NOTWITHSTANDING THE VERDICT, TO VACATE JUDGMENT AND ENTER A NEW JUDGMENT IN FAVOR OF DEFENDANT AND FOR NEW TRIAL ON ISSUE OF DAMAGES ONLY

In this matter, heretofore heard and submitted on November 6, 1992, the court now rules as follows:

The Court having previuously taken the various motion sof the defendant Whittier Union HIgh School District, under submission, now rules as follows on the respective motions:

Motion for Judgment Notwithstanding the Verdict

Said Motion is granted and judgment is ordered enteered in favor of defendant Whitter Union High School, in this matter.

The record is clear that plaintiff's position in this case was either there had been a violation of public policy in terminating the plaintiff's employment or that plaintiff's employment was not "at will" and he coul dnot be terminated without cause. The jury clearly found against the plaintiff on both these issues. The Jury instructions and plaintiff's counsel's argument on the issue of violation of public policy make it evident that there were two claimed basis of violation of public policy--either that the plaintiff was discriminated against due to his race or that he was fired because of his use of his union to resolve some disputes

with his employer. Question No. 1 of the Special Verdict indicates that the jury found neither of these claims to be true. Accordingly plaintiff's claims in reliance on a "violation of public policy" argument fail. The jury further foun din Question 17 of the Special Verdict that in essence plaintiff was an "at will" employee.

While the Court recognizes that Question 17 did not ask that specific question, it appears that the above finding is consistent with the jury verdict. Since an "at will" employee can be terminated with or without cause, plaintiff's claim that he could not be terminated except for cause fails.

Further, there was no evidence of any other terms or conditions of the plaintiff's employment that were violated by the said defendant and therefore based on Flait v. North American Watch (3 C.A.4, 467), and Slivinsky v. watkins Johnson Co., (221

C.A.3rd 799), the plaintiff cannot maintain a cause of action for breach of the implied covenant of good faith and fair dealing.

Page 1 of 2 pages

DEPT SEL

MINUTES ENTERED

11-12-92

COUNTY CLERK

MINUTE ORDER

APPENDIX "E"

Order and Judgment Pursuant to Code of Civil Procedure § 629

APPENDIX "E"

RIC. C OTTAIANO, ESQ. - BAR NO. 106 137
PETER B. LANBORG, ESQ. - BAR NO. 144 319
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A Professional Corporation
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Attorneys for Defendants, WHITTIER UNION HIGH SCHOOL DISTRICT, a school district of Los Angeles County, WHITTIER HIGH SCHOOL, A subdivision of WHITTIER UNION HIGH SCHOOL DISTRICT, PAUL MUSCHETTO, LEE PANAGOS and RON PERRY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES, SOUTHEAST

NO:VC005195

CHARLES HENRY CUNNINGHAM)
)
Plaintiff,)
)
v.)
)
WHITTIER UNION HIGH SCHOOL)
DISTRICT, a school District)
of Los Angeles County;)
WHITTIER HIGH SCHOOL, a sub-)
division of WHITTIER UNION)
HIGH SCHOOL DISTRICT;)
PAUL MUSCHETTO; LEE PANAGOS;)
RON PERRY;and DOES 1 through)
10, inclusive,)
)
Defendants.)

ORDER FOR AND JUDGMENT BY COURT PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE, §629

The motion of defendant, WHITTIER UNION HIGH SCHOOL DISTRICT, a school district of Los Angeles County, for the order hereinafter made came on regularly for hearing on November 6, 1992. Ric C. Ottaiano appeared as attorney for defendants and Jacque Boyle appeared as attorney for plaintiff. The matter was taken under submission and the Court's ruling by way of minute order issued on November 12, 1992.

On proof being made to the satisfactory of the Court, and good cause appearing therefore:

IT IS HEREBY ORDERED that:

1. The judgment heretofore entered on September 24, 1992, is vacated and set aside; and

2. Defendants, WHITTIER UNION HIGH SCHOOL DISTRICT, a school district of Los Angeles County, WHITTIER HIGH SCHOOL, a subdivision of WHITTIER UNION HIGH SCHOOL

DISTRICT, PAUL MUSCHETTO, LEE PANAGOS, and RON PERRY, have and recover judgment notwithstanding the verdict against plaintiff, that plaintiff take nothing by his complaint on file herein, and that defendants recover their costs herein, taxed at $_____.

Dated: December 16, 1992

s/ Chris R. Conway
The Honorable Chris R. Conway,
Judge of the Superior Court
of California, County of Los Angeles

APPENDIX "F"

Opinion of the California Court of Appeal, 2nd Appellate District, Division 2

APPENDIX "F"

NOT TO BE PUBLISHED
IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION TWO

CHARLES HENRY CUNNINGHAM, Plaintiff and Appellant, v. WHITTIER UNION HIGH SCHOOL DISTRICT et al., Defendants and Respondents.	FILED 3/3/95

APPEAL from a judgment of the Superior Court of Los Angeles County. Chris R. Conway, Judge. Affirmed.

Jacque Boyle for Plaintiff and Appellant.

Lynberg & Watkins, Ric C. Ottaiano and Peter B. Langborg for Defendants and Respondent.

Charles Henry Cunningham, a probationary employee performing custodial work for the Whittier Union High School District, was terminated from his employment. A jury found that the school district was entitled to terminate Cunningham without good cause. It also found that Cunningham was not terminated in violation of public policy. Nevertheless, it awarded Cunningham monetary damages. The trial court then granted to the school district judgment notwithstanding the verdict. We affirm.

FACTS

Cunningham performed custodial work for the Santa Ana School District from 1982 to 1989, but sensed that promotion was unlikely at that job. Thus, in 1989, Cunningham applied for a advertised position as a "leadman" with respondent Whittier Union High School District (the school district).

During his interview at the school district, Cunningham informed his interviewers that he sought the leadman position because it would be a promotion, and stressed that he wanted this to be a permanent job. He was told that he would be subject to a mandatory 12-month probationary period applicable to all classified employees, with reviews at three, six and eleven months; however, Cunningham was also told he needn't worry because this "would [just] be a formality" in light of his experience level. Cunningham was not hired for the leadman position.

One month later, Cunningham received a telephone call stating that a custodial position was open at the school district and suggesting that he apply for it. He realized that he would be would be taking a pay cut if he accepted the position, but believed there was more opportunity for promotion in Whittier. The same state-

ments relating to job permanency and probationary status were made during this second interview at Whittier. Cunningham was not hired for the custodial position.

Shortly after being turned down for the second time Cunningham encountered respondent Lee Panagos, as assistant vice principal at Whittier High. Panagos revealed that the individual hired for the custodial position had not worked out and suggested that Cunningham reapply for the job. Panagos reiterated that probation was a formality and that there was a change at promotion. Cunningham as hired the following day. The statements made by Panagos relating to probation led Cunningham to believe this was a permanent job. He admitted having received written information disclosing that he was subject to a 12-month probationary period. Cunningham understood this meant he could be fired for any reason while on probation. 1/

Cunningham started working at the school district in mid-December 1989. He suffered an on-the job accident in mid-April of 1990 and was off work until June. Following his accident, Cunningham found it difficult to go to work"because nothing ever good was said to me no matter what I did," and this caused him to develop an alcohol dependency. He was fired on July 27, 1990.

Cunningham received periodic evaluations during the term of his employment at the school district. The first of these, dated January 22, 1990, showed that Cunningham met work performance standards. Two subsequent evaluations, in April an July of 1990, indicated that his work was unsatisfactory which he felt was unfair.

1/ The testimony is as follows:
"Q [by defense counsel] Well, Mr. Cunningham, isn't it true that while on probation it was your understanding that you could have been fired irrespective of

your performance?

A" As I said before, I didn't believe that. I was told that I would have no problem on probation with the experience that I had, and I went, took the job understanding that statement.

Q" Do you think we are talking about two different things. "I am not asking you what you believed Mr. panagos to be telling you. I am asking you a different question, sir.

"You understood that while on probation you could have been fired irrespective of your performance; isn't that right.

"[Plaintiff's counsel]: I think that's asked and answered.

"The Court: One last time.

"Is that what you understood, sir?

"The Witness: That's what I understood."

Cunningham attributed his termination to several factors. First, he reported to the union and to management that the operations supervisor, respondent Ron Perry, and others, once drank on the job. Second, he and three other custodians complained to the union about the working conditions; specifically, they did not like being required to eat their meals in a particular spot. Third, when Cunningham

was asked to turn in his supply room key, he thought he was being accused of theft, and told Panagos he imagined that Ron Perry would be the one who would be stealing supplies. Fourth, Cunningham felt he was assigned more work than he could handle, starting at the end of June and beginning of July, and his inability to clean 31 rooms caused numerous complaints from the teachers who used the rooms.

Fifth, at a meeting of staff members, Perry--who is black-- directed a remark to Cunningham to the effect that when a white man speaks to him, he wants that man to look him right in the eye. Cunningham was one of the few "non-minority" (i.e., white) people there. The other workers treated him coldly after that incident, and he felt isolated. Cunningham sis not believe a supervisor's explanation that Perry was making a joke, and complained to Panagos and respondent Paul

Muschetto, the school principal, about Perry's statement. Both Panagos and Muschetto called Perry in to reprimand him for making the racial remark, and instructed him to apologize. At trial, Cunningham initially claimed that Perry never apologized for the remark, but he later agreed that Perry wrote a letter regarding the statement, saying, in part, that it was not intended to be racist and that he was only trying to get Cunningham to listen to him.2/ Cunningham's deposition, read at trial, indicates that he felt Perry apologized. Perry is the only employee who discriminated against him on the basis of race. Perry's supervisors had never had any prior complaints that Perry made racist remarks.

Perry testified that his remark about "white guys" was misconstrued, and that he orally apologized to Cunningham, which Cunningham denied. Perry, Panagos

and Muschetto stated that Cunningham was terminated because he was not doing his job, not because he was considered a troublemaker. A number of teachers from the school district testified that Cunningham left their schoolrooms uncleaned throughout the term of his employment there. After making repeated complaints to administration, some of the teachers

---

2/ Perry's letter said, "What I said in the meeting was said jokingly, but Charles [Cunningham] took it the wrong way. I am very sorry. If you think that I should be removed from my position for this, then please do so."

---

resorted to cleaning their classrooms themselves. When the home economics teacher left requests written on her blackboard to have the floors of the cooking are mopped, Cunningham admittedly left sarcastic written replies for her.

At respondent's request, the trial court granted nonsuit on Cunningham's

cause of action for interference with economic advantage. The court also struck Cunningham's claim for punitive damages.

In a special verdict, the jury made the following findings: First, it found that the school district did not terminate Cunningham's employment in violation of public policy, and that respondents Perry, Panagos and Muschetto did not discriminate against Cunningham on the basis of his race. Second, it found that the individual respondents intentionally committed outrageous acts or conduct against Cunningham, which cause him to suffer severe emotional distress and $20,000 in damage. Third, it found that Cunningham could be terminated without cause, but that the school district breached the implied covenant of good faith and fair dealing in his employment contract. It awarded Cunningham $77,170 for breach of the implied covenant.

In a post-judgment order on September 24, 1992, the trial court reduced the verdict by $20,000, effectively finding that the emotional distress award was preempted by worker's compensation laws. In a second post-judgment order, the court denied Cunningham's motion for a new trial. In a third post-judgment order, on November 12, 1992, the court granted the school district judgment notwithstanding the verdict on the claim for breach of the implied covenant, based on the jury's special findings that Cunningham was not terminated in violation of public policy and was an at-will employee. On December 16, 1992, the court vacated the original judgment in favor of Cunningham and entered a judgment in favor of respondents. A notice of appeal was filed on December 22, 1992.

DISCUSSION

1. Intentional Infliction of Emotional

Distress

The trial court threw out the jury award of $20,000 against Perry, Panagos and Muschetto for intentional infliction of emotional distress after finding that Cunningham's exclusive remedy was a workers' compensation claim.

The Supreme Court has concluded that when the manifestly unfair and outrageous intentional misconduct attributed to an employer "is actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the Labor Code [citing the Worker's Compensation act]." (Cole v. Fair Oaks Protection Dist. (1987) 43 Cal. 3d 148, 160.) The worker's compensation remedy applies to both physical and emo-

tional injury, and to coemployees acting within the scope of employment. (Lab. Code § 3601; Livitsanos v. Superior Court (1992) 2 Cal.4th 744, 752.)

The facts of the Cole case merit examination. Cole was a fire captain employed by the defendant. He was elected as a union representative. His superior began a campaign of deliberate harassment against him during union negotiations and took punitive actions against him because of his union activities. He was: falsely accused of dishonesty; given unjustified low performance ratings whereas previously he had always received superior performance ratings; demoted and publicly stripped of his captain's badge; subjected to "kangaroo" disciplinary proceedings; faced with his superior's application to force him involuntary retirement; assignment humiliating and menial duties; and ordered to return from sick leave to per-

form entry level work. As a result of the incessant harassment, cole suffered a stroke, became paralyzed, and was reduced to communicating by blinking. (43 Cal.3rd at pp.152-153.) Despite the utterly egregious intentional conduct of Cole's co-workers, the Supreme Court found that Cole was limited to his workers' compensation remedy because the objected-to conduct constituted a normal, inherent part of the employment relationship. (Id. at p. 161.)

In this case, Cunningham argues that respondents' conduct contravened fundamental public policy, and was therefore not covered by workers' compensation. (Livitsanos v. Superior Court, supra, 2 Cal.4th at p.755.) However, the jury's factual finding that respondents did not discriminate against him on the basis of race forecloses him from arguing that particular public policy violation. Instead, the public policy violations to which he

points are fabrication of false, negative work reports; public humiliation by a superior; failure to give him an adequate apology; withholding janitorial supplies; assigning excessive work; retaliation for exercising union grievance rights and reporting other employees' misconduct; and retaliation for exercising workers' compensation rights following his on-the-job injury.

Virtually all of Cunningham's "public policy" claim are the same as those the Supreme Court found were an "inherent part of the employment setting" in Cole: the unfair work assignments, poor performance evaluations, harassment for union activities, and humiliations suffered in front of other employees.3/ These incidents can be readily and unquestionably categorized as work related. None of them rises to the level of a public policy violation.

In short, Cunningham's claim for intentional infliction of emotional distress is barred as a matter of law. The trial court correctly rejected the jury's award on this cause of action.

2. Implied Covenant of Good Faith and Fair Dealing

In it's order granting judgment n.o.v., the trial court observed that Cunningham's position during the trial was twofold: (1) Cunningham posited that he was not an at-will employee, and (2) he contended that the school district violated public policy by firing him, regardless of whether he was an at-will employee. The jury resolved both of these issues against Cunningham. The panel specifically found that Cunningham could be fired without cause. It also expressly found that the school district did not terminate Cunningham's employment-

3/ Some of the conduct to which Cunningham points was not alleged in the complaint as the source of his emotional distress. The complaint lists only the following causes of his distress: false accusations of theft, public humiliation on the basis of race, assigning an excessive workload, public reprimands, false reports of his poor performance, and causing him to be discharged without cause. In any event, "whistle-blowing" resulting in harassment and termination are covered by the workers' compensation exclusivity provisions. (Shoemaker v. Myers (1990) 52 Cal.3d 1, 25.)

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in violation of public policy. More particularly, the jury found that the district's employees did not discriminate against Cunningham on the basis of race.

Given these findings, it was entirely inconsistent for the jury to award Cunningham $77,170 for breach of the covenant of good faith and fair dealing. Cunningham could be fired at any time, with or without cause. Thus, no implied covenant to terminate except for cause could be read into his employment contract.

Moreover, his claim of a breach of

the implied covenant of good faith and fair dealing is unavailing. "An allegation of breach of the implied covenant of good faith and fair dealing is an allegation of breach of an 'ex contractu' obligation, namely one arising out of the contract itself. The covenant of good faith is read into contracts is order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes." (Foley v. Interactive Data Corp., (1988) 47 Cal.3d 654, 690.) In other words, the sole focus is on the words of the contract itself, to determine what a party's benefits are. It is only a denial of those agreed-upon benefits that constitute a breach of good faith. (Id. at p. 699, fn. 41) It should be emphasized that "Contractual remedies, even for the breach of the implied covenant, are not affected by the motive of

the breaching party." (Flait v. North American Watch Corp. (1992) Cal.App.4th 467, 480, emphasis added.)

Here, Cunningham failed to show that any express covenant or contractual promise was violated by the school district, or that the school district denied a benefit which the parties' contract expressly provided. Thus, Cunningham's claim for breach of the implied covenant of good faith and fair dealing is unsupported by any evidence, and the trial court properly granted judgment notwithstanding the verdict on this cause of action.4/

3. Interference with Prospective Economic Advantage

The trial court nonsuited Cunningham on his third cause of action against Panagos and Muschetto for intentional interference with prospective economic advantage. His claim fails as a matter of law.

Claims for tortious interference may be made against third parties who induce the breach of a contract between others. No claim tortious interference may be made by one

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4/ Cunningham insists on confusing his sixth cause of action for breach of the implied covenant of food faith and fair dealings, a contract claim, with his first cause of action for tortious discharge in contravention of public policy. (Foley, supra, 47 Cal.3d at pp. 665-671. See Flait v. North American Watch Corp., supra, 3 Cal.App.4th 467, 481, fn. 2.) Public policy simply does not enter into the equation on his sixth cause of action.

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party to a contract against the other party to the same contract. The latter situation is not tortious interference: it is a straightforward breach of contract claim. (Shoemaker v. Myers, supra, 52 Cal.3d 1, 24-25.)

The same reasoning applies to a fired employee's supervisors. The supervisors who make the firing decision are vested with the power to act for the ulti-

mate employer, in this case, the school district. The evidence in this case shows that Panagos and Muschetto were Cunningham's supervisors, and that they jointly and effectively made the decision to hire then fire Cunningham, as agents for the school district. Cunningham cannot sue his employer's agents for tortious interference with prospective economic advantage. (Id. at p. 25.)

4. Punitive Damages

As shown in the preceding discussion, Cunningham has ben unable to state any claim for damages, let alone punitive damages.

5. New Trial

Cunningham asked the trial court to grant a new trial due to a claimed defect in the jury instruction on his first cause of action for wrongful discharge. The instruction in question stated that a termination of employment in violation of

public policy meant that the discharge could not be based on racial discrimination or union membership.

Contrary to his claim on appeal, Cunningham did not ask the trial court for a new trial on the grounds that the instruction failed to list all possible public policy violations. Rather, he contended that the explanation of what constituted racial animus was deficient. In his motion, Cunningham argued, "The instruction as given was misleading. The jury should have been instructed to the effect that a single event, even a single word, can give rise to a cause of action for discrimination on the basis of race, color or creed." Cunningham also found fault with the instruction's explanation of retaliation for exercise of union rights.

On appeal, Cunningham's argument is quite different. Now he urges that the

trial court should have instructed the jury on a passel of other possible public policy theories. This new position cannot be countenance on appeal. It appears that both during and after trial, Cunningham agreed that there were only two public policy theories for presentation to the jury. In fact, during the hearing on Cunningham's motion for a new trail, the trial court observed,". . . [T]he main [instruction] dealing with this area was agreed upon by both counsel and specifically set forth that the two claimed violations of public policy, and it was specifically set forth in the jury instructions, was the one dealing with the discrimination issue, the one dealing with the union situation, those two issues. And from what I understood everyone agreed in this case those were the only two public policy issues involved in this case. . . My reading of the verdict was that the

jury found that there was not a discharge violation of either of those public policies." (Emphasis added.) Defense counsel the replied, "Absolutely agree . . . ."

In short, Cunningham cannot agree to certain jury instructions during trial, then dream up new theories on appeal that he never asked the trial court to include, and which were not, in any event, mentioned in his motion for a new trial.

DISPOSITION

The judgment in favor of respondents is affirmed.

NOT TO BE PUBLISHED.

/s/ Boren

BOREN, P.J.

We Concur:

FUKUTO, J.

NOTT, J.

APPENDIX "G"

Denial of Petition for Review by the California Supreme Court

APPENDIX "G"

Second Appellate District, Division Two,
No. BO73053
S046008

IN THE SUPREME COURT OF CALIFORNIA

Supreme Court
FILED May 24 1995
Robert Wandruff, Clerk

CHARLES HENRY CUNINGHAM, Appellant

v.

WHITTIER UNION HIGH SCHOOL DISTRICT Et Al., Respondents

Appellant's petition for review DENIED.

LUCAS
Chief Justice

CERTIFICATE OF SERVICE BY MAIL

JACQUE BOYLE, declares and states:

That I am a member of the Bar of the Supreme Court Court of the United States. That I am not a party to the within action, and my business address is 201 No. Figueroa Street., Suite 1425, Los Angeles, CA 90012. On August 22, 1995, pursuant to United States Supreme Court Rules, I served the within PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT, on all parties involved in said action, by placing three copies thereof, enclosed in a sealed envelope with postate thereon fully prepaid in the Untied States Mail at Los Angeles, California, addressed as follows:

OFFICE OF THE CLERK OF THE SUPREME COURT
OF THE STATE OF CALIFORNIA
4250 State Building, 455 Golden Gate Ave.
San Francisco, CA 94102

OFFICE OF THE CLERK, COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 2
300 South Spring Street
Floor 2, North Tower
Los Angeles, CA 90013-1213

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2020 East First Street
Santa Ana, CA 92705-4015

Honorable CHRIS R. CONWAY
TRIAL JUDGE OF THE SUPERIOR COURT
Southeast District
12720 Norwalk Blvd.
Norwalk, California 90503

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 22, 1995, at Los Angeles, California.

Jacque C. Boyle

JACQUE BOYLE